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12  
13 **UNITED STATES DISTRICT COURT**  
14  
15 **DISTRICT OF NEVADA**

16 ASHENAFI G. ABERHA,

17 Plaintiff,

18 vs.

19 DIRECTOR NEVADA DEPT OF  
20 CORRECTIONS, et al.,

21 Defendants.

22 Case No. 3:19-cv-00606-MMD-WGC

23  
24 **DEFENDANT'S MOTION FOR**  
25 **SUMMARY JUDGMENT**

26  
27  
28 Defendant, Eric Delafontaine, by and through counsel, Aaron D. Ford, Attorney  
General of the State of Nevada, and Andrea M. Dominguez, Deputy Attorney General, do  
hereby move for summary judgment. This Motion is brought pursuant to Federal Rule of  
Civil Procedure 56 on the grounds that there are no genuine disputes as to any material  
fact and Defendant is entitled to judgment as a matter of law. This Motion is based on  
the following Memorandum of Points and Authorities, the attached exhibits, and all  
papers and pleadings on file in this action.

29  
30 **I. INTRODUCTION**

31  
32 This Court should grant summary judgment. Plaintiff Ashenafi Aberha (Aberha)  
33 alleges while being incarcerated at Ely State Prison (ESP), that Defendant, Eric  
34 Delafontaine (Officer Delafontaine) failed to protect him in violation of the Eighth  
35 Amendment by allowing another inmate to sexually assault him. (ECF No. 5 at 4-5)  
36 Despite these allegations, Aberha's case is deficient because he cannot show that Officer

1 Delafontaine was aware of and disregarded an excessive risk to his safety. Further,  
 2 Office Delafontaine is entitled to qualified immunity.

3 **II. NATURE OF THE ACTION**

4 Aberha is an inmate in the lawful custody of the Nevada Department of  
 5 Corrections (NDOC) and is currently housed at ESP. (ECF No. 11-1 at 1). Aberha filed a  
 6 civil rights action pursuant to 42 U.S.C. § 1983. (*Id.*). The events at issue in this  
 7 complaint allegedly occurred on September 20, 2018, while Aberha was housed at ESP.  
 8 (*Id.* at 4).

9 Aberha sues NDOC Director James Dzurenda (Director Dzurenda), Warden W.  
 10 Gittere (Warden Gittere), Correctional Officer Sunday (Officer Sunday), Correctional  
 11 Officer Delafontaine (Officer Delafontaine), and Correctional Officer G.T. Davis (Officer  
 12 Davis) (ECF No. 11 at 3). Aberha alleges three counts and seeks monetary damages and  
 13 injunctive relief. (*Id.*).

14 In the Screening Order, Aberha's Eighth Amendment claims for failure to protect  
 15 with respect to Director Dzurenda, Warden Gittere, Officer Sunday, and Officer Davis  
 16 were dismissed from the action. (*Id.* at 6). The § 1983 claims against another inmate for  
 17 sexual verbal harassment were dismissed from this action as well. (*Id.*) A court ordered  
 18 early mediation conference was held on October 20, 2020. (ECF No. 15) A settlement was  
 19 not reached. (*Id.*) Defendant filed an Answer to Aberha's Complaint on December 21,  
 20 2020. (ECF No. 28) Discovery closed on March 22, 2021. (ECF No. 30) Now that  
 21 discovery has concluded, Defendant moves for summary judgment.

22 **III. FACTUAL ANALYSIS**

23 **A. Plaintiff's Factual Account**

24 Aberha alleges that while at ESP, prison officials housed him with a sexual  
 25 predator, inmate Daniel Booker. (ECF No. 11 at 3). Aberha contends that Booker  
 26 sexually assaulted him three times while he was in the cell with him. (*Id.*). Aberha  
 27 reported the first incident to Officer Delafontaine, who was working in the unit, but  
 28 Officer Delafontaine made fun of him. (*Id.*) When Aberha got off the bed to use the

1 bathroom, he claims that Booker exposed himself to him. (*Id.*) Booker then choked  
 2 Aberha, threw him against the wall, and stuck his finger in his anus. (*Id.*) When Aberha  
 3 got away, he pushed the intercom. (*Id.*) Thirty minutes later, a C/O answered the  
 4 intercom and responded, “It’s count time.” (*Id.*) Booker allegedly told Aberha that if he  
 5 said anything, he would kill him. (*Id.*)

6 Aberha further contends that when Caseworker Travis came to the cell, she  
 7 witnessed Booker yelling and screaming at him. (*Id.* at 4) Travis told Booker to get out of  
 8 Aberha’s face. (*Id.*) Aberha alleges that Booker pushed him onto the bed, pulled his  
 9 shorts down, choked Plaintiff, punched Plaintiff in the stomach, and said, “I’m going to  
 10 rape you.” (*Id.*) Aberha alleges that he could feel Booker’s penis on top of his legs while  
 11 Booker was on top of him. (*Id.*) Booker continued to assault Aberha until the officers  
 12 came into the room to stop Booker from attacking him. (*Id.*)

13 Aberha filed a grievance and a Prison Rape Elimination Act (PREA) report. (*Id.*)  
 14 The nurses and doctors examined Aberha for injuries. (*Id.*) Aberha alleges that he had  
 15 continuous pain in his testicles after the attack. (*Id.*) Aberha claims the attack could  
 16 have been avoided if the C/O had not said it was count time and made him wait even  
 17 though his life was in danger.<sup>1</sup> (*Id.*) Aberha alleges that the prison officials have denied  
 18 all levels of his grievances. (*Id.*)

19 **B. Defendant’s Undisputed Facts**

20 On September 20, 2018 at around count time (11:00 a.m.), Officer Delafontaine was  
 21 told by Aberha that it was not working with his cellmate and that they needed to be  
 22 separated. (See Declaration of Eric Delafontaine attached as **Exhibit A**) Correctional  
 23 Officer Sunday talked to the inmates in 4B15 and told them it was count time and asked  
 24 if they could wait until count was done to be separated, otherwise he would take care of it  
 25 right now. (*Id.*) Both Aberha and inmate Booker agreed they could wait until after count  
 26 to be separated. (*Id.*) Once count was commenced both Officer Delafontaine and Officer

27  
 28 <sup>1</sup> Although Aberha alleges that the attack could have been avoided if the C/O had not said it was count time and made him wait to be separated, it is undisputed that the alleged attack started before the intercom button was pressed.

1 Sunday stepped out for count. (*Id.*) At no point in time did Aberha tell Officer  
 2 Delafontaine that he had been sexually assaulted by inmate Booker. (*Id.*)

3 Caseworker Melissa Travis (CCS Travis) was notified by the unit staff that Aberha  
 4 and inmate Booker could no longer be housed together in their assigned cell in Unit 4B.  
 5 (*See Declaration of Melissa Travis attached as **Exhibit B***) CCS Travis called the  
 6 classification housing coordinator to inform them the inmates were requesting separation.  
 7 (*Id.*) CCS Travis was asked to speak with both inmates to see if the situation could be  
 8 resolved. (*Id.*) At approximately 11:43 a.m. CCS Travis walked through the unit control  
 9 post onto the Unit 4B tier to speak with both inmates. (*Id.; see also **Exhibit C***) As CCS  
 10 Travis approached the cell door, she was told by inmate Booker that he and Aberha could  
 11 no longer house together because they were too different and Aberha ran his mouth a lot.  
 12 (*Id.*) Aberha was standing near the back of the cell and tried to speak to CCS Travis  
 13 when inmate Booker hit Aberha in the face and knocked him onto the bottom bunk. (*Id.*)  
 14 CCS Travis ordered inmate Booker to stop striking Aberha and to come back to the front  
 15 of the cell to discuss the situation. (*Id.*) CCS Travis immediately waived to correctional  
 16 staff for assistance. (*Id.*) Inmate Booker proceeded to choke Aberha screaming at him.  
 17 (*Id.*) CCS Travis yelled and ordered inmate Booker to stop striking Aberha, to which  
 18 Booker complied and walked to the front of the cell as correctional staff approached to  
 19 respond to the incident. (*Id.*) While Aberha alleged that Booker had pulled down his  
 20 shorts, if this occurred, it was before any NDOC personnel arrived on the scene as  
 21 everyone was fully clothed at all times while CCS Travis and the correctional officers  
 22 responded to the cell. (*Id.*) CCS Travis did not witness sexual activities of any kind. (*Id.*)

23 Officer Sunday and Officer Delafontaine responded to CCS Travis' request for  
 24 assistance. (*see Exhibits A and C*) When they got to the cell door, the inmates were  
 25 separated and on separate sides of the cell. (*Id.*) Both inmates were restrained without  
 26 incident. (*Id.*) Aberha was taken to the top shower and inmate Booker was taken to the  
 27 lower shower<sup>2</sup>. (*Id.*) Aberha promptly received medical treatment. (**Exhibit D**) Aberha

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28 <sup>2</sup> Placement of inmates in the shower is routine in these situations as it is a location that can  
 separate the inmates for privacy and security.

1 told medical that he was choked by inmate Booker but denied any other injuries or pain.  
2 (*Id.*) The only injuries Aberha received was a scratch to the right side of his neck. (*Id.*)  
3 After shift command spoke with both inmates, Aberha was then taken back to his cell.  
4 (see Exhibit A)

5 On September 28, 2018, Aberha reported the alleged sexual assault to the PREA  
6 hotline. (**Exhibit E**) Investigative Report No. IR-2018-ESP-001453 was opened by the  
7 Inspector General's Office on October 1, 2018. (*Id.*) A preliminary investigation was  
8 completed, and the matter was referred for a criminal investigation on November 19,  
9 2018. (*Id.*) The investigation was closed as unsubstantiated for sexual abuse on  
10 September 12, 2019. (*Id.*)

11 Aberha filed Informal Grievance report 2006-30-73539 on October 25, 2018.  
12 (**Exhibit F** at 7) In his Informal Grievance Aberha alleges that on September 20, 2018,  
13 his cellmate inmate Booker sexually abused him three times in cell 4B 15. (*Id.*) Aberha  
14 also alleged he spoke with an investigator on October 18, 2018 and would like to know  
15 what the status of the investigation was. (*Id.*) Melissa Travis denied Aberha's grievance  
16 and told him that the allegation has already been referred to the IG's office and is in  
17 active investigation. (*Id.* at 8) When the investigation is completed, Aberha was  
18 informed that he would receive notification of the outcome. (*Id.*)

19 Aberha filed a First Level appeal on December 5, 2018. (*Id.* at 4-5) In his First  
20 Level Grievance Aberha restated the allegations from the Informal Grievance and asked  
21 to be transferred to another prison. (*Id.* at 5) Warden Gittere denied Aberha's grievance  
22 on December 7, 2018 and told Aberha that the grievance is already under investigation  
23 and has not been completed yet. (*Id.* at 6) Aberha was also told that when the  
24 investigation was complete, he would be notified, and that he could discuss his concerns  
25 with housing and classification with his caseworker. (*Id.*)

26 Aberha filed a Second Level appeal on January 1, 2019. (*Id.* at 1-2) In his Second  
27 Level appeal Aberha restated the allegations from the Informal Grievance and again  
28 requested to know the status of the report. Deputy Director Harold Wickham denied

1 Aberha's grievance on January 14, 2019 and told Aberha that the IG's office is currently  
 2 investigating the matter and that he would be notified once it was completed. (*Id.* at 3)  
 3 Aberha was also told that he could discuss his concerns about his housing and  
 4 classification with his caseworker. (*Id.*)

5 **IV. LEGAL ARGUMENT**

6 **A. Standard of Review**

7 Summary judgment "should be rendered if the pleadings, the discovery and  
 8 disclosure materials on file, and any affidavits show there is no genuine issue as to any  
 9 material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ.  
 10 P. 56(c). Summary judgment allows courts to avoid unnecessary trials when there is no  
 11 dispute as to the facts before the court. *Id.*; *Northwest Motorcycle Ass'n v. United States*  
 12 *Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). The purpose of summary judgment is to  
 13 isolate and then terminate claims that are factually unsupported. *Celotex Corp. v. Catrett*,  
 14 477 U.S. 317, 323- 24 (1986). A moving party is not required to disprove the non-moving  
 15 party's claims. *Id.* Instead, the moving party is simply required to point out the absence of  
 16 evidence supporting the non-moving party's claims. *Id.* The non-moving party is then  
 17 required to come forward with some evidence supporting his claim. *Anderson v. Liberty*  
 18 *Lobby, Inc.*, 477 U.S. 242, 255 (1986). Mere allegations or denials in the pleadings are not  
 19 sufficient to show a genuine issue for trial. *Id.* at 248.

20 Material facts are facts that might affect the outcome of the case. *Anderson*, 477 U.S.  
 21 at 248. The court should not consider disputes concerning irrelevant or unnecessary facts.  
 22 *Id.* Where there is a complete failure of proof on an essential element of the case for the  
 23 non- moving party, all other facts become immaterial, and the moving party is entitled to  
 24 judgment as a matter of law. *Celotex*, 477 U.S. at 323-24.

25 "When opposing parties tell two different stories, one of which is blatantly  
 26 contradicted by the record, so that no reasonable jury could believe it, a court should not  
 27 adopt that version of the facts for purposes of ruling on a motion for summary judgment."  
 28 *Scott v. Harris*, 550 U.S. 372, 380 (2007).

1       The United States Supreme Court has altered the summary judgment standard for  
 2 inmate cases. *Beard v. Banks*, 126 S.Ct. 2572, 2576 (2006). Although inmate non-moving  
 3 parties may still be entitled to have the facts reviewed “in a light most favorable,” this  
 4 favorable review is tempered “in light of the deference that courts must show to [the] prison  
 5 officials.” *Id.*

6       **B. Eighth Amendment Failure to Protect Claim Against Officer  
 7 Delafontaine**

8       The Constitution does not mandate comfortable prisons, but neither does it permit  
 9 inhumane ones. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Farmer v. Brennan*, 511  
 10 U.S. 825, 832 (1994). The “treatment a prisoner receives in prison and the conditions  
 11 under which he is confined are subject to scrutiny under the Eighth Amendment.”  
 12 *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Eighth Amendment imposes duties on  
 13 prison officials to take reasonable measures to guarantee the safety of inmates and to  
 14 ensure that inmates receive adequate food, clothing, shelter, and medical care. *Farmer*,  
 15 511 U.S. at 832.

16       In *Farmer*, the Supreme Court established a very demanding standard for  
 17 “deliberate indifference.” Negligence is insufficient. *Id.* at 835. Even civil recklessness  
 18 (failure to act in the face of an unjustifiably high risk of harm which is so obvious that it  
 19 should be known) is insufficient to establish an Eighth Amendment violation. *Id.* at 836–  
 20 37. It is not enough that a reasonable person would have known of the risk or that a  
 21 defendant should have known of the risk. *Id.* at 842. Rather, deliberate indifference is  
 22 established only where the defendant subjectively “knows of and disregards  
 23 an excessive risk to inmate health and safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057  
 24 (9th Cir.2004) (internal citation omitted) (emphasis added). Prison officials may avoid  
 25 Eighth Amendment liability by showing:

26       (1) “that they did not know of the underlying facts indicating a  
 27 sufficiently substantial danger and that they were therefore  
 28 unaware of a danger”; (2) “that they knew the underlying  
 facts but believed (albeit unsoundly) that the risk to which  
 the facts gave rise was insubstantial or nonexistent”; or (3)

1 that “they responded reasonably to the risk, even if the  
2 harm ultimately was not averted.” *Rodriguez v. Secretary for*  
3 *the Department of Corrections*, 508 F.3d 611 at 617–18 (11<sup>th</sup>  
4 Cir.2007) (quoting *Farmer*, 511 U.S. at 844, 114 S.Ct. at  
5 1982–83 (1994)).

6  
7  
8 After reviewing the record, the evidence shows that there is insufficient evidence  
9 for a reasonable jury to conclude that Officer Delafontaine was aware that inmate Booker  
10 posed a substantial risk of harm to Aberha.

11 As stated above, the only thing Aberha said to Officer Delafontaine was that it was  
12 not working with his cellmate. (see Exhibit A) At no time did Aberha tell Officer  
13 Delafontaine that inmate Booker had sexually assaulted him or posed a serious risk to his  
14 safety. (*Id.*) In fact, when asked Aberha agreed to wait until after count was commenced  
15 to be separated from inmate Booker. (*Id.*) Therefore, it is not reasonable to believe that  
16 Officer Delafontaine knew of and disregarded an excessive risk to Aberha’s safety.

17 When Officer Delafontaine was alerted by CCS Travis to the fight between Aberha  
18 and inmate Booker, he responded promptly. (see Exhibits A and C) Aberha and inmate  
19 Booker were immediately separated. (*Id.*) Aberha was given prompt medical treatment,  
20 and then taken back to his cell. (*Id.*) As stated above, inmate Booker was removed from  
21 the floor. Thus, Officer Delafontaine acted quickly and reasonably to remove any threats  
22 to Aberha’s safety. Further, the IG conducted both a preliminary investigation and a  
23 criminal investigation and found Aberha’s claims that inmate Booker sexually abused  
24 him to be unsubstantiated.

25 Consequently, Aberha cannot produce sufficient evidence of Officer Delafontaine’s  
26 deliberate indifference to such a risk. Even assuming facts existed from which Officer  
27 Delafontaine could have inferred that inmate Booker posed a substantial risk of serious  
28 harm to Aberha, there is no evidence that he actually drew that inference. Had he  
inferred that inmate Booker posed a serious harm to Aberha – and that there was a  
strong likelihood that such serious harm would arise – he would have separated Aberha  
and Booker prior to count taking place. Therefore, Aberha cannot prevail on this issue.

1           **C. Alternatively, Officer Delafontaine is Entitled to Qualified Immunity**

2           Officer Delafontaine is entitled to Qualified Immunity. It is a long-standing  
 3 principle that governmental officials are shielded from civil liability under the doctrine of  
 4 Qualified Immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

5           The defense of qualified immunity protects “government  
 6 officials . . . from liability for civil damages insofar as their  
 7 conduct does not violate clearly established statutory or  
 8 constitutional rights of which a reasonable person would have  
 9 known.” The rule of qualified immunity “provides ample  
 10 support to all but the plainly incompetent or those who  
 11 knowingly violate the law.” “Therefore, *regardless of whether*  
 12 *the constitutional violation occurred*, the officer should prevail if  
 13 the right asserted by the plaintiff was not ‘clearly established’  
 14 or the officer could have reasonably believed that his particular  
 15 conduct was lawful.” Furthermore, “[t]he entitlement is an  
 16 immunity from suit rather than a mere defense to liability; ... it  
 17 is effectively lost if a case is erroneously permitted to go to  
 18 trial.”

19           *Shroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995) (emphasis in original; internal  
 20 citations omitted).

21           When conducting the qualified immunity analysis, courts “ask (1) whether the  
 22 official violated a constitutional right and (2) whether the constitutional right was clearly  
 23 established.” *C.B v. City of Sorona*, 769 F.3d 1005, 1022 (9th Cir. 2014) (internal citation  
 24 omitted).

25           The second inquiry, whether the Constitutional right in question was clearly  
 26 established, is an objective inquiry that turns on whether a reasonable official in the  
 27 position of the defendant knew or should have known at the time of the events in question  
 28 that his or her conduct was Constitutionally infirm. *Anderson v. Creighton*, 483 U.S. 635,  
 639-40 (1987); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th Cir. 2012). Only where a  
 governmental official’s belief as to the constitutionality of his or her conduct is “plainly  
 incompetent” is Qualified Immunity unavailable. *Stanton v. Sims*, 134 S.Ct. 3, 5 (2013)  
 (per curiam). Governmental officials are entitled to high deference when making this  
 determination, (*Anderson*, 483 U.S. at 640), requiring the Court to assess whether  
 Qualified Immunity is appropriate “in light of the specific context of the case.”

1 *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014) (quoting *Robinson v. York*, 566  
 2 F.3d 817, 821 (9th Cir. 2009)).

3 Although the Supreme Court “does not require a case directly on point for a right to  
 4 be clearly established, existing precedent must have placed the statutory or constitutional  
 5 question beyond debate.” *Witherow v. Baker*, No. 18-17233, 2021 (9th Cir. May 18, 2021)  
 6 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct.  
 7 548, 551 (2017)). “This demanding standard protects all but the plainly incompetent or  
 8 those who knowingly violate the law.” *Id.* (quoting *Wesby*, 138 S. Ct. at 589 (cleaned up)).  
 9 In determining whether this standard is met, the Court considers whether there are  
 10 “cases of controlling authority” in the plaintiffs’ jurisdiction at the time of the incident  
 11 “which clearly established the rule on which they seek to rely,” or “a consensus of cases of  
 12 persuasive authority such that a reasonable officer could not have believed that his  
 13 actions were lawful.” *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). As such,  
 14 “liability will not attach unless there exists a case where an officer acting under similar  
 15 circumstances . . . was held to have violated the [Eighth Amendment.]” *Emmons v. City  
 16 of Escondido*, 921 F.3d 1172, 1174 (9th Cir. 2019) (citing *White v. Pauly*, 137 U.S. 548,  
 17 551-52 (2017) (per curiam).<sup>3</sup>

18 The Eighth Amendment imposes duties on prison officials to take reasonable  
 19 measures to guarantee the safety of inmates and to ensure that inmates receive adequate  
 20 food, clothing, shelter, and medical care. *Farmer*, 511 U.S. at 832. As stated above  
 21 deliberate indifference is established only where the defendant subjectively “knows of and  
 22 disregards an excessive risk to the inmate’s health and safety. *Toguchi*, 391 F.3d at 1057.

23 Given the particularized facts and circumstances of this case, it was not clearly  
 24 established that any action taken by Officer Delafontaine was unconstitutional, because  
 25 Officer Delafontaine had no notice that inmate Booker posed a serious risk to Aberha’s  
 26 safety. Further, Officer Delafontaine was not aware of Aberha’s allegations that inmate

27 \_\_\_\_\_  
 28 <sup>3</sup> As recently as September 2021, the Ninth Circuit affirmed the importance of qualified immunity in the prison context. *See Witherow v. Baker*, No. 18-17233, 2021 (9th Cir. May 18, 2021) (holding prison officials were entitled to qualified immunity where they screened and monitored an inmate’s call to his attorney).

1 Booker sexually assaulted him until after the fight took place. With no notice, Officer  
2 Delafontaine cannot be liable for a violation of the Eighth Amendment. Therefore, Officer  
3 Delafontaine is entitled to qualified immunity because his actions were reasonable.

4 **V. CONCLUSION**

5 Officer Delafontaine is entitled to summary judgment on the basis of qualified  
6 immunity because Aberha cannot demonstrate that every reasonable prison official would  
7 have perceived an excessive or intolerable risk of serious injury to Aberha. Further,  
8 Aberha has failed to prove evidence of damages. Officer Delafontaine respectfully request  
9 this Court enter summary judgment in his favor.

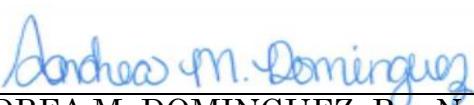
10 **VI. EXHIBITS**

11 A. Declaration of Eric Delafontaine  
12 B. Declaration of Melissa Travis  
13 C. Video of Unit 4B on September 20, 2018 during the incident  
14 D. Unusual Occurrence Dated September 20, 2018  
15 E. Investigative Report No. IR-2018-ESP-001453  
16 F. Inmate Grievance Report No. 2006-30-73539

17 DATED this 21st day of May, 2021.

18 AARON D. FORD  
19 Attorney General

20 By:

21   
22 ANDREA M. DOMINGUEZ, Bar No. 15209  
23 Deputy Attorney General

24 *Attorneys for Defendants*

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## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 21st day of May, 2021 I caused to be served a copy of the foregoing, **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** by U.S. District Court CM/ECF Electronic Filing to:

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